MAC PETROLEUM SDN BHD v. EVERMORE ACCESS SDN BHD

HIGH COURT MALAYA, MELAKA
MOHD RADZI ABDUL HAMID J
[CIVIL APPEALS NO: MA-12ANCC-1-01-2024
& MA-12ANCC-2-01-2024]
3 MARCH 2025

Abstract – *Whilst the court would generally uphold the exclusive jurisdiction clause, the same could be reversed if the party challenging the exclusive jurisdiction clause is able to show exceptional circumstances to warrant a refusal to give effect to such an agreement. The burden is on the party challenging the exclusive jurisdiction clause to show why they should not be bound to honour the part of the contract where they had agreed to jurisdiction.*

CIVIL PROCEDURE: *Courts – Jurisdiction – Exclusive jurisdiction clause in memorandum of agreement – Provision for dispute to be submitted to International Chamber of Commerce London and London High Court to make final judgment – Whether clause to be strictly upheld – Whether could be departed if strong exceptional circumstances shown – Whether there were extenuating circumstances warranting refusal to honour agreed exclusive jurisdiction clause*

CONTRACT: *Agreement – Construction of clauses – Exclusive jurisdiction clause in memorandum of agreement – Provision for dispute to be submitted to International Chamber of Commerce London and London High Court to make final judgment – Whether clause to be strictly upheld – Whether could be departed if strong exceptional circumstances shown – Whether there were extenuating circumstances warranting refusal to honour agreed exclusive jurisdiction clause*

There were two appeals brought by the plaintiff: (i) against the decision of the Sessions Court to stay all proceedings pending adjudication of the plaintiff's claim in a foreign forum ('Appeal No 1-01'); and (ii) against the decision of the Sessions Court under encl. 8 to not hear the plaintiff's application for summary judgment against the defendant following the Sessions Court decision to grant the stay (Appeal No 2-01). The core contention in these appeals cenreed around the effect of cl. 9 of the memorandum of understanding ('MOU') between the plaintiff, as the purchaser, and the defendant, as the seller, for the purchase and takeover of 50,000 metric tons of Ultra Low Sulphur Diesel EN590 ('product'). Clause 9 titled 'Applicable Law' provides that the MOU shall be interpreted in accordance with the law and, in the event of any dispute incapable of amicable solution, the dispute shall be submitted to the International Chamber of Commerce London and the London High Court will make the

final judgment. The plaintiff's case was that in breach of the terms of the MOU, the defendant failed to deliver the product to the plaintiff and therefore, demanded refund of the deposit of USD150,000. On the other hand, the defendant contended that the products originated from Kazakhstan and routed to off port limit ('OPL') Singapore. The products arrived in Singapore. However, despite requests, the plaintiff failed to do the CIQ/SGS inspection on the products and off load the products since it did not secure buyers for them. After waiting a few days, the vessel left OPL Singapore with the products. The defendant thus claimed that since the plaintiff failed to lift the products, it was the plaintiff who committed a breach of the MOU and by operation of cl. 9 of the MOU, the dispute must be referred to the High Court in London. The Sessions Court Judge, in allowing the stay, held that the express provisions of cls. 9 and 11 of the MOU clearly obligated the parties to submit any dispute to the High Court in London and to refuse the stay would amount to condoning a breach of the agreement by the plaintiff.

Held (allowing Appeal No 1-01 and setting aside Appeal No 2-01):

(1) An exclusive jurisdiction clause must be upheld and enforced by the court unless the plaintiff could satisfy the court of the existence of exceptional circumstances justifying the non-enforcement of that clause. The onus was on the plaintiff seeking to oust the application of the exclusive jurisdiction clause to show the exceptional circumstances. The SCJ had committed an error in applying the law in confining himself to just upholding the exclusive jurisdiction clause without addressing whether there existed exceptional circumstances in favour of refusing the stay. (paras 8, 9 & 24)

(2) The core dispute between the parties was about delivery and payment when the products were still on-board the vessel at OPL Singapore. The plaintiff claimed that the defendant failed to deliver, whilst the defendant claimed that the plaintiff failed to take delivery or secure buyers for the products. There was no dispute involving any party in Kazakhstan, any owner of the vessel or any party claiming ownership of the products anywhere between Kazakhstan and Singapore. (para 17)

(3) Both the disputing parties were companies incorporated and resident in Malaysia. There was no connection between the defendant and England, one of the principles considered in the case of *The Eletheria*. This factor was considered together with the following matters: (i) the dispute did not involve consideration of facts that occurred in Kazakhstan but just next door to Malaysia, *ie*, Singapore; (ii) the dispute only involved the issue whether the defendant failed to deliver the products as claimed by the plaintiff or whether it was the plaintiff who failed to secure purchasers for the products at OPL Singapore as claimed by the defendant; (iii) whether the products had in fact arrived in Singapore as

claimed by the defendant could be answered by the Singapore Port authorities and it would be nearer for such witnesses to come to Malaysia if needed than to go to London; (v) the convenience to have the matter adjudicated in Malaysia not only served the plaintiff but the defendant equally; (vi) the provision under cl. 9 did not require the dispute to be adjudicated applying laws of England; and (vii) the use of English law that may have required the High Court in London to adjudicate on the claim as stated in cl. 11 was not applicable as the plaintiff's claim was not premised on a breach of indemnity with respect to title in the products but on failure to deliver them. Even if the defendant's case required the calling of witnesses other than from Malaysia and Singapore, there was no impediment for such witnesses to give evidence *via* online proceedings from anywhere in the world. (paras 25-27)

(4) Clause 11 did not specify which law was to apply to the MOU. It merely stated in general terms that it should be interpreted in accordance with the law. It did not state that the MOU and any dispute arising from it shall be governed by the laws of England. Therefore, in absence of a specific reference to any other law, the MOU was governed by the laws of Malaysia since the MOU was contracted in Malaysia between Malaysian incorporated companies who were carrying out their business in Malaysia. Whilst the sanctity and intent of the mutually agreed terms of contract must be preserved and enforced, it should not stop the court from considering extenuating circumstances such as that were present in this appeal. The defendant's insistence on the application of cl. 11 of the MOU was seen more as a procedural strategy than to genuinely place the dispute before the High Court in London. (paras 28 & 29)

Case(s) referred to:

Ambico Offshore Sdn Bhd v. Sapura Fabrication Sdn Bhd [2022] CLJU 2523; [2022] 1 LNS 2523 HC ***(refd)***

Che Group Bhd v. Dato Kweh Team Aik [2019] CLJU 1292; [2019] 1 LNS 1292 HC ***(refd)***

Globus Shipping & Trading Co (Pte) Ltd v. Taiping Textiles Bhd [1976] CLJU 31; [1976] 1 LNS 31 FC ***(foll)***

Intergraph Cadworx & Analysis Solutions, Inc v. EDS Asia Sdn Bhd [2013] 8 MLJ 729 ***(refd)***

Jaya Sudhir Jayaram v. Nautical Supreme Sdn Bhd & Ors [2019] 7 CLJ 395 FC ***(refd)***

Kraken Services Ltd (Formerly Known As Kraken Reinsurance Services Ltd) v. Q Life And Medical Insurance Company Asia Region & Anor [2021] 1 LNS 2602; [2021] CLJU 2602 HC ***(refd)***

Niaga Tani Sdn Bhd v. Samarez Holdings Bhd [2002] 7 CLJ 327 HC ***(refd)***

Nutri Mills Products Sdn Bhd v. CMA CGM Malaysia Sdn Bhd & Anor [2013] 8 MLJ 377 ***(refd)***

Open Country Dairy Ltd v. Able Food Sdn Bhd [2021] 7 CLJ 716 CA ***(foll)***

The Eleftheria [1969] 1 Lloyd's Rep 237 ***(refd)***

United Overseas Bank Ltd v. United Securities Sdn Bhd (In Liquidation) & Ors [2021] 9 CLJ 593 CA ***(refd)***
Vinmar Overseas (Singapore) Pte Ltd v. PTT International Trading Pte Ltd [2018] SGCA 65 ***(refd)***
World Triathlon Corporation v. SRS Sports Centre Sdn Bhd [2019] 1 CLJ 381 CA ***(foll)***

For the appellant - Chew Wee Kian & Melissa Ong Bee Ying; M/s HS Chew & Co
For the respondent - Yong Li Yang; M/s Rohani Soon & Assocs

Reported by S Barathi

JUDGMENT

Mohd Radzi Abdul Hamid J:

Matter Before This Court

[1] This is a decision on two appeals each brought by the plaintiff in appeals no. MA-12ANCC-1-01/2024 and MA-12ANCC-2-01/2024 against the decision of the Sessions Court under Civil Suit No. MA-B52-NCC-32-08/2023. Appeal case 1-01 is against the decision of the Sessions Court under encl. 6 to stay all proceedings pending adjudication of the plaintiff's claim in a foreign forum. Appeal 2-01 is against the decision of the Sessions Court under encl. 8 to not hear the plaintiff's application for summary judgment against the defendant following the Sessions Court decision to grant the stay.

Background Facts

[2] The core contention in both these appeals centres around the effect of a provision in an agreement called memorandum of understanding dated 17 March 2023 entered into between the parties for the purchase and takeover of 50,000 metric tons of Ultra Low Sulphur Diesel EN590 ('MOU'). The plaintiff is the purchaser whilst the seller is the defendant. That provision in issue appears as cl. 9 titled applicable law which provides that the MOU shall be interpreted in accordance with the law and in the event of any dispute incapable of amicable solution, the dispute shall be submitted to the International Chamber of Commerce London and the London High Court will make the final judgment.

[3] It is the plaintiff's case that at the request of the defendant the plaintiff had paid to the defendant the amount of USD150,000 as deposit for security guarantee payment for re-routing cost of the product and the plaintiff then took over title of the product. In breach of the terms of the MOU the defendant failed to deliver the product to the plaintiff. The plaintiff demanded refund of the said sum and an amount of RM65,000 was paid by the defendant leaving a balance of USD135,555.55 (RM610,000 equivalent).

[4] The defendant on the other hand claims that it was the plaintiff who failed to take delivery or secure purchasers of the products after it arrived at OPL ('off port limit') Singapore and therefore the deposit payment was

forfeited. As for the partial payment of RM65,000 the defendant claims that the money was paid as a financial assistance to the plaintiff who had taken out loans to raise the security deposit. It was not a partial refund. Since the plaintiff failed to lift the products it was the plaintiff who committed a breach of the MOU.

[5] The defendant contends that by operation of cl. 9 of the MOU the dispute must be referred to the High Court in London since it was an express and agreed contractual term between the parties.

Decision Of The Sessions Court

[6] In deciding in favor of allowing the stay, the Sessions Court held that the decisions of the Court of Appeal in *United Overseas Bank Ltd v. United Securities Sdn Bhd (In Liquidation) & Ors* [2021] 9 CLJ 593; [2021] 6 MLJ 897 and *Open Country Dairy Ltd v. Able Food Sdn Bhd* [2021] 7 CLJ 716; [2021] MLJU 969 had clearly held that where there is a contractually agreed exclusive jurisdiction clause requiring parties to adjudicate any dispute in the agreed foreign jurisdiction then such clause must be upheld. The learned judge opined that the express provisions of cls. 9 and 11 of the MOU clearly obligated parties to submit any dispute to the High Court in London. The learned judge also found that to refuse the stay would amount to condoning a breach of the agreement by the plaintiff.

The Law

[7] To begin with this court refers the Court of Appeal decision in *World Triathlon Corporation v. SRS Sports Centre Sdn Bhd* [2019] 1 CLJ 381; [2019] 4 MLJ 394; [2018] 6 AMR 122; [2018] AMEJ 0843 CA where it was held that Malaysian Courts are obliged to give effect to an agreed jurisdiction clause. Disregarding such a clause would effectively mean the courts condoning a breach of the agreement. The Court of Appeal went on to hold that notwithstanding the general position that such clauses must be upheld, that position may be reversed if "the party challenging the exclusive jurisdiction clause is able to show exceptional circumstances amounting to a strong cause" warranting a refusal to give effect to such an agreement:

> [20] On the question of how such discretion is to be exercised when confronted with a foreign jurisdiction clause, the then Federal Court in *Globus Shipping* accepted the approach as summarised by Brandon J in *The Eleftheria* [1969] 2 All ER 641 as follows:
>
> > The principles established by the authorities can, I think, be summarised as follows:
> >
> > (i) where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not;

(ii) the discretion should be exercised by granting a stay unless strong cause for not doing so is shown;

(iii) The burden of proving such strong cause is on the plaintiffs;

(iv) In exercising its discretion, the court should take into account all the circumstances of the particular case;

(iv) In particular, but without prejudice to the following matters, where they arise, may properly be regarded:

(a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts;

(b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects;

(c) With what country either party is connected, and how closely;

(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages;

(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would:

(i) be deprived of security for that claim;

(ii) be unable to enforce any judgment obtained;

(iii) be faced with a time-bar not applicable in England; or

(iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

[21] So, to surmise, where there is an exclusive jurisdiction clause, effect should be given to it and a stay ought to be granted, unless the party challenging the exclusive jurisdiction clause is able to show exceptional circumstances amounting to a strong cause warranting a refusal. The burden is on the party challenging the exclusive jurisdiction clause to show why they should not be bound to honour the part of the contract where they had agreed to jurisdiction.

[8] Thus, based on *World Triathlon* (*supra*) and the decision of the Federal Court in *Globus Shipping & Trading Co (Pte) Ltd v. Taiping Textiles Bhd* [1976] CLJU 31; [1976] 1 LNS 31; [1976] 2 MLJ 154 the onus would be on the plaintiff seeking to oust the application of the exclusive jurisdiction clause to show the exceptional circumstances. This approach was also applied by the Court of Appeal in *Open Country Dairy Ltd v. Able Food Sdn Bhd* [2021] 7 CLJ 716; [2021] MLJU 969 where it was held:

[79] It is therefore clear that there was an exclusive jurisdiction clause per cl. 19.2 of the Terms of Trade and this was incorporated in the contracts for the purchase of the IWMP. Therefore, the respondent must be held to their bargain and a Malaysian Court is obliged to give effect to the

exclusive jurisdiction clause, unless the respondent, as the party seeking to avoid the application of the clause, are able to establish that there are exceptional circumstances to justify the contrary (See: *World Triathlon*).

[80] Having carefully examined the record of appeal, we did not find any convincing evidence that would qualify as exceptional circumstances to justify not giving effect to the exclusive jurisdiction clause. Of course, from the perspective of the respondent, it would be quite unfair for the action to be filed in the New Zealand courts as they had paid a substantial sum to the appellant and would have to incur further costs in having to file and prosecute their action in New Zealand.

[81] But then again, those were the terms upon which they had contracted with the appellant when they agreed to purchase the latter's goods. Whatever the inconvenience that the respondent may be put to is purely a consequence of their agreement. The respondent's complaint in having to file the action in New Zealand is a complaint that can cut both ways. The appellant can easily mount a like counter argument particularly when it is clear that the action ought to have been filed in New Zealand in accordance with clause 19.2 of the Terms of Trade.

[9] Therefore it is clear based on those decisions that the starting position is that an exclusive jurisdiction clause must be upheld and enforced by the court unless the plaintiff can satisfy the court of the existence of exceptional circumstances justifying the non-enforcement of that clause.

Arguments Of Parties

[10] The plaintiff submitted that the exceptional circumstances in favor of adjudicating the dispute in Malaysia are:

(i) there is no genuine dispute by the defendant against the plaintiffs claim since by tendering part refund of RM65,000 the defendant has admitted to its liability;

(ii) clause 9 of the MOU does not stipulate that the applicable law governing the contract is English law and does not expressly state that the High Court in London shall have exclusive jurisdiction to determine any dispute;

(iii) the payment of the security deposit and part refund was made in Malaysia;

(iv) both the plaintiff and the defendant are companies incorporated and residents in Malaysia;

(v) all relevant witnesses reside in Malaysia;

(vi) all relevant evidence to the dispute is in Malaysia;

(vii) since both parties are Malaysians, it would therefore make both logistical and economic sense for the dispute to be adjudicated in Malaysia; and

(v) the defendant's reliance on cl. 9 of the MOU is merely to frustrate or delay the plaintiff's claim.

[11] Reference was made to the decisions in *Globus Shipping & Trading Co (Pte) Ltd v. Taiping Textiles Bhd* [1976] CLJU 31; [1976] 1 LNS 31; [1976] 2 MLJ 154; *Ambico Offshore Sdn Bhd v. Sapura Fabrication Sdn Bhd* [2022] CLJU 2523; [2022] 1 LNS 2523; [2022] MLJU 2663; *Niaga Tani Sdn Bhd v. Samarez Holdings Bhd* [2002] 7 CLJ 327; [2002] MLJU 140; *Che Group Bhd v. Dato Kweh Team Aik* [2019] CLJU 1292; [2019] 1 LNS 1292; [2019] MLJU 782; *Nutri Mills Products Sdn Bhd v. CMA CGM Malaysia Sdn Bhd & Anor* [2013] 8 MLJ 377 and *Intergraph Cadworx & Analysis Solutions, Inc v. EDS Asia Sdn Bhd* [2013] 8 MLJ 729.

[12] In arguing for the enforcement of cl. 9 of the MOU, the defendants state that:

(i) the products did not originate from Malaysia;

(ii) the port of loading and discharge of the products is not in Malaysia;

(ii) the original supplier of the products is not in Malaysia;

(iii) the trade currency is not in the Malaysian currency;

(iv) the payment of RM65,000 was not a part refund but financial assistance;

(v) the express provision of cl. 9 reemphasised by cl. 11 of the MOU which states that any dispute arising from the indemnity given by the seller shall be subject to the jurisdiction of the High Court in London; and

(vii) that cl. 9 is an expressed provision of the MOU which must be given its full effect and not rendered irrelevant and redundant.

[13] Reference was made to the decisions in *United Overseas Bank Ltd v. United Securities Sdn Bhd (In Liquidation) & Ors* [2021] 9 CLJ 593; [2021] 6 MLJ 897; *Vinmar Overseas (Singapore) Pte Ltd v. PTT International Trading Pte Ltd* [2018] SGCA 65; and *Kraken Services Ltd (Formerly Known As Kraken Reinsurance Services Ltd) v. Q Life and Medical Insurance Company Asia Region & Anor* [2021] 1 LNS 2602; [2021] CLJU 2602; [2021] MLJU 2956.

Deliberations

[14] Before moving to the deliberations on the merits of this appeal it would be necessary to reproduce cls. 9 and the relevant parts of cl. 11 of the MOU:

> Clause 9:
>
> 9. Applicable Law
>
> 9.1 This MOU shall be interpreted in accordance with the law and in the event of any dispute incapable of amicable solution, the dispute shall be submitted to the International Chamber of Commerce London and London High Court will make the final judgment

Clause 11:

11. Letter Of Indemity (LOI) for Title Take Over deliveries:

We hereby warrant to you that at the time the title is transferred as specified under the terms of the above agreement we had the right to sell the cargo to you and we had unencumbered title to the said cargo.

...

We hereby ... indemnify you ... against any claim made against you by anyone as a result of breach by us of any of our warranties as set out above ...

... all disputes, controversies or claims arising out of or in relation to this indemnity or the breach, termination or validity hereof shall be subject to the exclusive jurisdiction of the High Court of Justice in London, England.

[15] Now, the facts of the case as narrated by the defendant in encls. 7 & 13/pp. 24 & 58 of the record of appeal is that the products originated from Kazakhstan and routed to OPL Singapore, The products arrived in Singapore on 16 March 2023. However, despite requests the plaintiff failed to do the CIQ/SGS Inspection on the products and off load the products since it did not secure buyers for them. After waiting a few days, the vessel then left OPL Singapore with the products.

[16] Thus, as far as the defendant is concerned the original ownership of the products at the port of loading in Kazakhstan, type or specifications of the products and transportation of the products are not matters in issue. They cannot be an issue anyhow because according to the defendant the products arrived at OPL Singapore on 16 March 2023 whilst the MOU was signed only on the 17th and the security deposit totaling USD 150,000 was only paid on 17 March 2023 and 20 March 2023.

[17] After considering the respective affidavits this court finds that the core dispute between the parties is about delivery and payment when the products was still on-board vessel at OPL Singapore. The plaintiff claims that the defendant failed to deliver whilst the defendant claims that the plaintiff failed to take delivery or secure buyers for the products. Thus, there is no dispute involving any party in Kazakhstan, any owner of the vessel or any party claiming ownership of the products anywhere between Kazakhstan and Singapore.

[18] Now, in all the cases referred to by both parties with exception of *Vinmar Overseas* (*supra*) at least one of the disputing parties was a non-resident of the country where the claim was filed. In *Globus Shipping* (*supra*) the defendant was resident in Singapore, in *World Triathlon* (*supra*) the defendant was established in USA, in *Open Country Dairy* (*supra*) the defendant was incorporated in New Zealand, in *United Overseas Bank* (*supra*) the defendant

A was incorporated in Singapore and in *Kraken Reinsurance Services* (*supra*), the second defendant was incorporated in Qatar. In *Vimar Overseas* (*supra*) both plaintiff and defendant are companies incorporated in Singapore.

[19] In *Globus Shipping* (*supra*) the Federal Court agreed with the High Court that the convenience of the case preferred the dispute to be resolved B in Malaysia where witnesses are in Penang and the laws between Malaysia and Singapore are not dissimilar. In *World Triathlon* (*supra*) the Court of Appeal held that since the termination of the license agreement occurred in Florida, USA then Florida should be the forum for adjudication of the dispute. The Court of Appeal did not agree with the findings of the High C Court that since relevant witnesses and evidence relating to the sports event that was governed by the license agreement was in Malaysia then the dispute ought to be resolved in Malaysia. The court also took into account that the laws of USA may differ and it would have been costly to call expert witnesses to Malaysia to testify on US laws. In *Open Country Dairy* (*supra*), the Court D of Appeal held that inconvenience which may be caused to the plaintiff to have the dispute resolved in New Zealand is not a sufficient factor to justify preferring the matter to be heard in Malaysia. In *United Overseas Bank* (*supra*) the issue of jurisdiction involved the construction of a provision that contained a non exclusive obligation on the part of the borrower to submit E to the jurisdiction of the Singapore Court and the exclusive jurisdiction right of the lender to sue the borrower anywhere it chooses. The Court of Appeal held that the borrower was bound to submit to the jurisdiction of the Singapore Courts. It must be noted that the Court of Appeal did not as a matter of consideration discuss on whether there were any exceptional circumstances justifying refusal of the stay although it referred to the F decisions in *World Triathlon* (*supra*) and *Open Country Diary* (*supra*), In *Kraken Reinsurance* (*supra*) the High Court found that the conduct of parties showed that the plaintiff had substantially dealt with the second defendant which is based in Qatar and therefore, the issues in dispute should be resolved in Qatar as agreed under the exclusive jurisdiction clause of their agreement. The High G Court did not find that difficulties in language afforded exceptional circumstances since it was just speculative.

[20] In *Vinmar Overseas* (*supra*) referred to by the defendant the Singapore Court of Appeal took the position that an exclusive jurisdiction clause should be upheld unless there is a strong case justifying otherwise. The clause in that H case required parties to refer any dispute to the High Court of England sitting in London. The court discussed, *inter alia*, the factors justifying refusal of stay as laid out in the English case of *The Eleftheria* [1969] 1 Lloyd's Rep 237. In deciding to uphold the clause despite both parties being resident in Singapore, the court held that issue of whether the defendant has merits in I its defence is irrelevant and that the factors which render proceedings in Singapore more convenient than proceedings in the agreed forum are of

limited weight if they were foreseeable at the time when the parties made the jurisdiction agreement. In that case the Court of Appeal held that the plaintiff's argument that the defendant had no defence was not a strong case to justify refusing the stay.

[21] Coming back to the Appeal presently, it should be emphasised that the Federal Court's decision in *Globus Shipping* (*supra*) remains good law and therefore, the court's view as conveyed by Gill CJ that the court has the discretion whether or not to adjudicate a dispute despite parties' agreement to submit such dispute to a foreign jurisdiction is binding on this court. It should be noted that the Federal Court accepted the approach taken in *The Eleftheria (supra)*. In addition, this court is also bound by the decisions in *World Triathlon (supra)* and *Open Country Dairy (supra)* that held exclusive jurisdiction clauses must be upheld unless the plaintiff can show exceptional circumstances to hold otherwise.

[22] In *The Eleftheria (supra)* the relevant principles to the exercise of the court's discretion was set out as follows:

> The principles established by the authorities can, I think, be summarised as follows:
>
> (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not;
>
> (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown;
>
> (3) The burden of proving such strong cause is on the plaintiffs;
>
> (4) In exercising its discretion, the court should take into account all the circumstances of the particular case; and
>
> (5) In particular, but without prejudice to (4), the following matters, where they arise may properly be regarded:
>
> (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts.
>
> (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects.
>
> (c) With what country either party is connected, and how closely.
>
> (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.

A (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would:

(i) be deprived of security for their claim;

(ii) be unable to enforce any judgment obtained;

B (iii) be faced with a time-bar not applicable in England;

or

(iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

C **[23]** In *Jaya Sudhir Jayaram v. Nautical Supreme Sdn Bhd & Ors* [2019] 7 CLJ 395; [2019] 5 MLJ 1 the Federal Court held that to refuse a stay would require strong reasons and such reasons will be based on facts and circumstances:

> [52] Stating the matter very generally, in an application for injunction to
> D restrain or stay arbitration proceedings, or for an anti-suit injunction which has the effect of preventing a party from bringing a claim in any forum other than the forum parties agree to submit, strong reasons are required to displace the contractual obligation entered into in relation to an arbitration clause or an exclusive jurisdiction clause. Suffice if we refer to one leading English authority in support of this proposition. The decision
> E of the House of Lords in the case of *Donohue v. Armco Inc And Others* [2002] 1 All ER (Comm) 97 bears out exactly the logical basis for the above proposition in the following passages:
>
> Per Lord Bingham at p. 107 in para [24] E-H:
>
> F **Where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it**. Whether a party can show strong reasons, sufficient to displace the other party's *prima facie* entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case.
>
> G ...
>
> (emphasis added)

[24] Returning now to the Sessions Court's grounds of judgment it can be seen that in arriving at his decision the learned judge did not give any attention and consideration to whether there are exceptional circumstances.
H In this court's view, the learned judge had committed an error in applying the law when he confined himself to just upholding the exclusive jurisdiction clause without addressing whether there exist exceptional circumstances in favour of refusing the stay. There was absence of critical evaluation of the issues and the facts.

I

[25] Foremost, in this court's view, unlike the cases referred earlier with the exception of *Vinmar Overseas (supra)* both the disputing parties in this appeal are companies incorporated and residents in Malaysia. By contrast, in those cases referred above, the *locus* of the foreign jurisdiction stipulated in the respective contracts or agreements coincides with where the defendant was incorporated or resident. There is no connection between the defendant and England in the present appeal unlike the defendants in *United Overseas*, *World Triathlon* and *Open Country Dairy*. This meets the consideration at part 4(c) of *The Eleftheria*.

[26] Now, that factor is not considered in isolation but also considered together with the following matters:

(i) the dispute here does not involve consideration of facts that occurred in Kazakhstan but just next door to Malaysia, *ie*, Singapore;

(ii) the dispute only involves the issue whether the defendant failed to deliver the products as claimed by the plaintiff or whether it is the plaintiff who failed to secure purchasers for the products at OPL Singapore as claimed by the defendant;

(iii) whether the products had in fact arrived in Singapore as claimed by the defendant can be answered by the Singapore Port authorities and it would be nearer for such witnesses to come to Malaysia if needed than to go to London;

(v) the convenience to have the matter adjudicated in Malaysia not only serves the plaintiff but the defendant equally;

(vi) the provision under cl. 9 does not require the dispute to be adjudicated applying laws of England; and

(vii) the use of English law that may have required the High Court in London to adjudicate on the claim as stated in cl. 11 is not applicable as the plaintiff's claim is not premised on a breach of indemnity with respect to title in the products but on failure to deliver them. All these factors satisfy part 4(a) of *The Eleftheria (supra)*.

[27] Even if the defendant's case requires the calling of witnesses other than from Malaysia and Singapore there is no impediment for such witnesses to give evidence *via* online proceedings from anywhere in the world which has now become the norm in dispute resolution since the COVID-19 pandemic. Notwithstanding that parties may have agreed to exclusive jurisdiction clauses, it must be said that the reality of how trials are conducted have drastically changed. The need for cross border travelling to foreign jurisdictions to adjudicate disputes are now mitigated by the use of online proceedings.

[28] On the issue of applicable law, cl. 11 does not specify which law is to apply to the MOU. It merely states in general term that it shall be interpreted in accordance with law. It does not state that the MOU and any dispute arising from it shall be governed by the laws of England. Therefore, in absence of a specific reference to any other law, this court holds that the MOU is governed by the laws of Malaysia since the MOU was contracted in Malaysia between Malaysian incorporated companies who are carrying out their businesses in Malaysia.

[29] Whilst this court agrees that the sanctity and intent of the mutually agreed terms of contract must be preserved and enforced it should not stop the court from considering extenuating circumstances such as that are present in this appeal. Other than insisting on this court to enforce cl. 11 as being an agreed contractual term, this court does not find how the defendant would be disadvantaged if the dispute is resolved in Malaysia where it is resident. The defendant's insistence on the application of cl. 11 of the MOU is seen more as a procedural strategy than to genuinely place the dispute before the High Court in London.

Conclusion And Decision

[30] In conclusion, this court finds that there are merits in the plaintiff's appeal. This court is satisfied that the plaintiff has shown exceptional circumstances or strong reasons for disallowing the stay.

[31] Therefore, the appeal in Appeal No. 1-01 is hereby allowed and the decision of the Sessions Court is set aside. Consequentially, the decision of the Sessions Court in Appeal 2-01 is therefore set aside. As a matter of natural course, the Sessions Court is therefore directed to hear the plaintiff's application for summary judgement under encl. 8. Costs for both appeals ordered cumulatively in the amount of RM2,500.